1989

Carrie Jo Law v. Robert Frank Law and M. Lynne Larson : Brief of Appellant

Utah Court of Appeals

W. Andrew McCullough; McCullough, Jones & Ivins; Eldon A. Eliason; Attorneys for Defendant/Appellant.
Marcella L. Keck; attorney for Plaintiff/Respondent.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---oooOooo---

CARRIE JO LAW,	:	
Plaintiff and Respondent,	:	
vs.	:	
ROBERT FRANK LAW,	:	Case No. 890033-CA
Defendant and Respondent,	:	Priority Number 14b.
M. LYNNE LARSON,	:	
Intervenor and Appellant.	:	

---oooOooo---

BRIEF OF APPELLANT

---oooOooo---

Appeal from Order of Dismissal of Complaint in Intervention
Fourth District Court for Millard County

Honorable John Wahlquist
Judge Pro Tem

W. Andrew McCullough
MCCULLOUGH, JONES & IVINS
930 South State Street #10
Orem, Utah 84058

Attorneys for Appellant

Marcella L. Keck
Attorney for Plaintiff and Respondent
9 Exchange Place
Suite 808
Salt Lake City, Utah 84111

Eldon A. Eliason
Attorney for Defendant and Respondent
P.O. Box 605
Delta, Utah 84624

TABLE OF CONTENTS

CASES CITED

STATUTES AND RULES CITED

OTHER SOURCES CITED

NOTE TO CITATIONS OF RECORD

All citations to the Court record are designated by the symbol (R.). All citations to the transcript of the motion hearing are designated separately by the symbol (T.).

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---oooOooo---

CARRIE JO LAW, Plaintiff and Respondent, vs. ROBERT FRANK LAW, Defendant and Respondent, M. LYNNE LARSON, Intervenor and Appellant.	:	Case No. 890033-CA

---oooOooo---

BRIEF OF APPELLANT

---oooOooo---

JURISDICTIONAL STATEMENT

This is a continuation of a divorce action in which the former wife engaged in collection proceedings against certain property in which Appellant has an interest. Appellant was therefore granted leave to intervene in the action to protect her interests. Her complaint in intervention was, thereafter, dismissed for no cause of action and it is from that order of dismissal that Intervenor appeals. Jurisdiction for this Court to decide appeals relating to divorce actions is conferred by Section 78-2a-4(2)(h) U.C.A., 1953, as amended.

STATEMENT OF ISSUES

The issues presented in this Appeal are as follows:

(a) Are there genuine and material issues of fact to be decided concerning the status of monies which have been earned as a result of the sale or rental of real property by a licensed real estate agent working for a broker; and did the District Court err in granting summary judgment without trying those issues?

(b) Does Intervenor's amended complaint in intervention set forth valid causes of action upon which she may be granted relief as prayed for in that amended complaint in intervention?

STATUTORY AND RULE PROVISIONS

> 61-2-10 U.C.A. - Restriction on Commissions - Affiliation with more than one broker.
>
> It is unlawful for any associate broker or sales agent to accept valuable consideration for the performance of any of the acts specified in this chapter from any person except the principal broker with whom he is affiliated and licensed. An inactive licensee is not authorized to conduct real estate transactions until he becomes affiliated with a licensed principal broker. No sales agent or associate broker may affiliate with more than one principal broker at the same time. Except as provided by rule, a principal broker may not be responsible for more than one real estate brokerage at that same time.

> 61-2-18 U.C.A. - Actions for Recovery of Compensation Restricted.
>
> (1) No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.

(2) No sales agent or associate broker may sue in his own name for the recovery fee, commission, or compensation for services as a sales agent or associate broker unless the action is against the principal broker with whom he is or was licensed. Any action for the recovery of a fee, commission, or other compensation may only be instituted and brought by the principal broker with whom the sales agent or associate broker is affiliated.

Rule 12 U.R.C.P. - Defenses and objections.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56 U.R.C.P. - Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting

affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an

adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF CASE

This was originally a divorce action between Carrie Jo Law and Robert Frank Law, Plaintiff and Defendant below and Respondents herein. A decree of divorce was entered between the parties on August 22, 1985 (R.53-57). The decree of divorce also provided for the sale of a service station in Delta, Utah. The decree provided, that if the station was not sold within a certain period of time, Robert would pay to Carrie the sum of $75,000.00 to extinguish any claims that she made to the station (R.55). Carrie Law was awarded custody of the four minor children of the parties and Defendant was ordered to pay $150.00 per month as child support for each of those children (R.54). On

September 14, 1987, a judgment was entered against Robert, in behalf of Carrie, in the amount of $6,500.00 for delinquent child support plus $350.00 attorney's fees (R.36-37). On April 27, 1988, an additional judgment was rendered against Robert, in behalf of Carrie, in the amount of $75,000.00 for payments due as division of marital property, plus $1,500.00 in attorney's fees.

Robert Law is a licensed real estate broker, operating under the name of Acres West Real Estate, and doing business in Millard County. Carrie, in an attempt to collect sums due to her under the judgments referred to above, caused writs of garnishment to be issued, in June, 1988, against three banks and two title insurance companies (R.100-122). The garnishment against Utah Title Company brought a reply that a real estate commission was due to Acres West Real Estate in the amount of $1,350.00 (R.121). Security Title Co. answered that, while no sums were due at that particular time, preliminary work had been done on some transactions, and that money might become due in the near future. Shortly thereafter, Robert moved to stay execution on the garnishment of Utah Title Co. (R.123) and accompanied his motion with an affidavit of his real estate agent, M. Lynne Larson. That affidavit stated that she was totally responsible for the sale and listing of the property on which the commission was due, and that she was due expenses and a commission in the amount of $702.00, out of the money attached by the garnishment

of Utah Title Company (R.125).

In response to Robert's motion to stay execution, Carrie filed a motion for order in aid of execution (R.142-143) seeking an order to seven title insurance companies, directing them to hold funds due to Acres West Real Estate and to notify Carrie when said sums were paid in to them. Thereafter, the real estate agent working for Acres West Real Estate, M. Lynne Larson, filed a motion to intervene (R.165). It should be noted that the motion to intervene was dated July 19, 1988, and does not show as being filed until October 14, 1988, sometime after the response thereto was filed, and on the same day that the memorandum decision was issued granting the motion (R.167). Counsel for Carrie Law was ordered to prepare a formal order to that effect, but the record does not show that she did so. Nevertheless, a complaint in intervention was filed by M. Lynne Larson on October 24, 1988 (R.170-173) claiming that funds due from Security Title Company as a result of sales she had made while working with Acres West Real Estate were in part her funds, and to the extent that they were, they were exempt from Carrie law's garnishments.

Carrie Law moved to dismiss the complaint in intervention, or for the summary judgment thereon (R.177-178). Intervenor moved to amend her complaint to state a second cause of action, to include the other garnished funds, and to cure certain technical defects (R.209-210). She also replied to the motion to

dismiss or for summary judgment, by filing a memorandum and case law attachments (R.186-206).

Oral arguments were held on the motions in front of a Judge Pro tem, John Wahlquist, on November, 1988, resulting in an order granting Intervenor's motion to file an amended complaint and immediately dismissing it for failure to state a cause of action (R.232). While the clerk was ordered to file the amended complaint in intervention, it was never actually filed, and a copy is therefore inserted as an addendum hereto.

Prior to the filing of the formal order, Intervenor moved, pursuant to Rule 59 U.R.C.P., to amend the order for error in law. The assigned Judge, Ray M. Harding, ruled by memorandum decision (R.229) that he had no jurisdiction to set aside the ruling of another Judge, and the order of Judge Wahlquist was entered.

SUMMARY OF ARGUMENTS

Appellant and Intervenor raises three issues for decision by this Court. First, Appellant argues that the Court's order of dismissal for failure to state a cause of action was in error under the Utah Supreme Court decisions regarding such dismissals.

Secondly, Appellant argues that the statutes cited by Carrie Law in the Court below, regarding a real estate agent's right to recovery of compensation, were erroneously construed to change ownership of the compensation from the sales agent to the

broker.

Thirdly, Intervenor contends that, regardless of the legal ownership of the compensation due to her as a sales agent, she is entitled to the equitable relief of a resulting trust over the money that she has earned as a real estate sales agent.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING INTERVENOR'S AMENDED COMPLAINT IN INTERVENTION FOR FAILURE TO STATE A CAUSE OF ACTION.

In the Court below, Plaintiff Carrie Law brought a motion to dismiss, or in the alternative for summary judgment, after Intervenor had filed her original complaint. The original complaint cited one cause of action, claiming that sixty percent of certain commissions due to Acres West Real Estate were due to her as the listing and selling agent, under a contractual agreement between her and her broker, Robert Law. The motion to dismiss was made pursuant to Rule 12(b)(6) on the basis that Intervenor had not stated a cause of action in her complaint. In the alternative, a summary judgment was asked for pursuant to Rule 56 U.R.C.P. The motion was supported by a memorandum in which neither procedural rule was discussed. No affidavits were filed in support of the motion, though a brief four-paragraph statement of facts was included in the memorandum. The entire argument of the memorandum was directed at the single cause of action contained in the first complaint in intervention

filed by Intervenor. In the oral arguments on the motion to dismiss, counsel for Carrie Law admitted that she had not had time to review the proposed amended complaint and was not yet ready to respond to it. She also indicated that the new cause of action appeared to bring up questions of fact which she would need time to explore. Counsel thus stated to the Court:

> Now if the Court finds Ms. Larson should be entitled to amend the complaint, be joined as an interested party and be allowed to amend the complaint, then we need time to respond to the amended complaint and to do some investigation as to what the nature of the agreements were, how much money is at issue, because we have no affidavits other than that previously filed by Ms. Larson which essentially says that these are real estate commissions due from Security Title and really has nothing to do with the bank account or anything else. I do think that one thing the Court can do today is give my client or order a writ of execution for those funds that are not in dispute by Ms. Larson (T.15).

Despite this admission on the part of counsel for Plaintiff, the Court ruled that it was ready to dismiss all causes of action brought by Intervenor. The Court did this despite the fact that it had not read any of the file, including the amended complaint sought to be filed by Ms. Larson. The Court stated, at the outset of the case:

> I didn't know I was gonna have this calendar until Monday, and I am not familiar with this file at all. I will let you tell me about it, and we will see what the other attorneys say (T.3).

While the motion was brought, in the alternative, under two separate rules of civil procedure, it appears that the Court granted the motion to dismiss, pursuant to Rule 12(b)(6) U.R.C.P.

The standard for such a dismissal was recently set forth in the case of Arrow Industries, Inc. vs. Zions First National Bank, 99 Utah Adv. Rep. 10 (Utah 1988). The standard for such a dismissal was defined in the Court's statement:

> A motion to dismiss is only appropriate where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim. In reviewing an order granting a motion to dismiss, we are obliged to construe the complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in its favor. 99 Utah Adv. Rep. at 11.

The Court below did not read the amended complaint. It did not read Intervenor's memorandum of points and authorities or any of the case law attached thereto. It did not inquire into the specific facts surrounding the claims made by Intervenor. It did not even give credence to the statements of counsel for Carrie Law that the new cause of action recited by Intervenor needed additional study and response. The Court, in reaching its completely uninformed decision, ruled in effect that Plaintiff would not be entitled to relief under any state of facts which could be proved. Intervenor contends that the Court could not possibly have decided those issues properly in a few minutes of oral arguments, without reading the pleadings, without reviewing the case law and without knowing the facts. This matter should therefore be remanded to the Court below with instructions to consider those items before making a decision.

Dismissals for failure to state a claim of action, pursuant

to Rule 12 U.R.C.P., are very closely related to summary judgments in behalf of Defendant, pursuant to Rule 56 U.R.C.P. While the Court below, in its final order, characterized its order as one of dismissal, it appears appropriate to review the situation pursuant to Rule 56 U.R.C.P. also. In the previously cited case of Arrow Industries vs. Zions First National Bank, the Court went on to say the following about summary judgment:

> Similarly, when ruling on an appeal from a motion for summary judgment, we inquire whether there is any genuine issue as to any material fact and, if there is not, whether the moving party is entitled to judgment as a matter of law. In reviewing the record on an appeal from a summary judgment, the Court treats the statements and evidenciary materials of the Appellant as if a jury would receive them as the only credible evidence and sustains the judgment only if no issues of fact which could affect the outcome can be discerned. 99 Utah Adv. Rep. at 11.

Appellant asserts that, under the separate standard set forth above, the Court's order granting relief to Carrie Law, can also not be sustained. Simply put, the Court did not have any facts in front of it from which it could rule that there were no genuine issues of fact and that the moving party was entitled to judgment as a matter of law. It is true that a narrative statement was made by Carrie's attorney in the nature of background on the case, for a judge who knew nothing of it. That background, however, was insufficient to apprise the Court of all necessary facts to fully decide the issue. As previously stated, counsel for Carrie Law admitted that she was not completely

informed of the facts upon which Intervenor relied to assert her claims. Under either standard, therefore, the Court's order of dismissal must be reversed.

II. INTERVENOR M. LYNNE LARSON IS A REAL PARTY IN INTEREST WHOSE CLAIMS ARE ENTITLED TO BE CONSIDERED BY THE COURT; AND SHE IS NOT BARRED FROM ASSERTING THOSE CLAIMS.

Intervenor's first cause of action makes claim that Intervenor, as a licensed real estate sales agent, working with Acres West Real Estate in which Defendant Robert Law is the broker, listed and sold certain properties from which commissions were due. These commissions were paid into Security Title Company of Millard County or Utah Title Company to be paid over to Acres West Real Estate. The contractual arrangement made between the broker and his real estate agent was that, in cases where the real estate agent both listed and sold the properties, she was entitled to sixty percent of the commission, and the agency was entitled to forty percent. Carrie Law, in her motion to dismiss, cited Section 61-2-10 U.C.A. (1953, as amended) which purports to require a sales agent to accept his commission only from the broker. She also cited Section 61-2-18 U.C.A. (1953, as amended) which prevents a sales agent from maintaining a legal action in her own name for the collection of a commission due. Plaintiff therefore contends that title to the money must pass to the broker prior to passing to the sales agent, and that, while title is so passing, it is reachable by the creditors of the

broker.

The Utah Legislature passed the statutes cited by Plaintiff in an attempt to regulate the real estate sales business. It requires a real estate agent to work under the direction of a broker who is licensed and bonded by the state Securities Commission. The statute does not purport to change the relationship between a broker and a salesperson, but only to regulate those who sell real estate and to protect buyers and sellers against improper conduct. That rule was stated in the case of Global Recreation vs. Cedar Hills Development, 614 P.2d 155 (Utah 1980) as follows:

> The purpose of those provisions is not to protect real estate developers who seek relief from their own contractual obligations; rather, it is for the protection of members of the public who rely on licensed real estate brokers and salesmen to perform tasks that require a high degree of honesty and integrity. The licensing requirements and the provisions designed to enforce compliance therewith are designed to assure such honesty and integrity. 614 P.2d at 158.

In the Utah Supreme Court case of Young vs. Buchanan, 259 P.2d 875 (Utah 1953) the Court held that a sales agreement under which a sales agent claimed a commission must have been between the seller and broker. In ruling so, however, the Court stated: "It may well be that Plaintiff is the real party in interest -- providing any legal claim whatsoever exists against the defendant." 259 P.2d at 878. In the instant case, in its memorandum decision of October 14, 1988, the Court found that

Intervenor did have a claim which she should be allowed to assert:

> The Court having considered Lynne Larson's motion to intervene will grant that motion.
>
> Rule 24 of the Utah Rules of Civil Procedure allows intervention as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action...." Ms. Larson's claim to part of the money in the bank account certainly gives her the required interest in the property.
>
> The Court is concerned that Ms. Larson seems to be represented in this intervention action by the plaintiff's attorney [Actually Defendant's attorney was representing her.]. Because of the potential for conflicts of interest, the Court would suggest that Ms. Larson obtain her own independent counsel (R.167).

The lower Court thus agreed with the pronouncement of the Utah Supreme Court in the Young vs. Buchanan case that Ms. Larson may well be a real party in interest in this particular action. Interestingly enough, because of the unusual situation, the Court found a potential conflict of interest in allowing her to even proceed through the same attorney as her broker. At the suggestion of the Court, Ms. Larson undertook to obtain independent counsel.

Appellant admits that there has been no clear decision by the Appellate Courts of this state concerning the status of commissions earned by a real estate agent working with a broker. In the previously cited case of Global Recreation, Inc. vs. Cedar Hills Development Co., the Court found that even a loose association between a real estate salesman and a broker was sufficient for the real estate agent to be able to claim a

commission (614 P.2d at 157-8). Thus, the real estate sales agent does not need to be an employee of the broker in the usual sense. The Court went on to say, "In any event, for a valid broker-salesman relationship to exist, it is not necessary that the broker receive a portion of the commission paid for the sale of a property." 614 P.2d at 158. Applying the general principles of the cited Court decisions, it does not follow that the broker is the owner of any of the commission earned by a real estate sales agent. The statutory restriction on commencing a legal action does not deprive a real estate sales agent of her property interest and give it to the broker. The public policy recited by the Utah Supreme Court as being behind the enactment of the statute is not enhanced by ruling that the money belongs to the broker first and that it is reachable by ordinary creditors of the broker. Public policy is not served by ruling, as the Court did orally below, that, "This is a contest between two potential creditors,..." (T.28). Intervenor is not an ordinary creditor of the broker where her commissions are concerned. If Defendant had been allowed to present full facts at trial, the facts would have shown that she listed certain properties herself, she sold them herself, and relied only for supervision and licensing approval on Defendant broker. This certainly gives her more than the status of an ordinary creditor over that particular money. The sixty percent of the commission

which was due to her under her contract with the broker, was her money, and did not belong to the broker.

III. INTERVENOR IS ENTITLED, UPON PROOF OF THE FACTS AS SHE CLAIMS THEM TO BE, TO A DETERMINATION THAT ANY INTEREST OBTAINED BY THE BROKER IN HER REAL ESTATE COMMISSIONS, IS SUBJECT TO A RESULTING TRUST IN HER FAVOR, AND THAT THE BROKER'S CREDITORS MAY NOT REACH SAID COMMISSIONS.

Intervenor does not admit that the legal title to the money due her as commissions has passed, or must pass, to the defendant broker. Nevertheless, legal title is not the issue. Whatever the Court may decide regarding legal title, and the legal rights thereunder, Intervenor clearly has an equitable interest in the money due her for commissions. The doctrine of resulting trust in the State of Utah appears to have been first recognized as such by the Utah Supreme Court in the case of Little vs. Alder, 428 P.2d 156 (Utah 1967) in which the Court ruled that there is a rebuttable presumption that a resulting trust arises where no relationship exists between one who pays the purchase price and the transferee of property (428 P.2d at 157).

The doctrine is closely related to the doctrine of constructive trust as referred to in Carnesecca vs. Carnesecca, 572 P.2d 708 (Utah 1977) where the Court stated:

> Equity will impress a constructive trust upon property in favor of a beneficiary of an oral trust under certain circumstances and no writing evidencing an intention to create a trust is required. Such is an equitable remedy arising by operation of law to prevent unjust enrichment and is not within the statute of frauds. The fact that parol evidence is admitted to prove its existence

necessarily requires the showing by clear and convincing evidence. 572 P.2d at 710.

The close relationship between the types of trust is also seen in the case of Hawkins v. Perry, 253 P.2d 372 when the Court declared the existence of a constructive trust over real property which one person held on an oral agreement to be transferred to a minor when he became of age. The house was paid for with money belonging to the minor; and the trust was declared after the record owner's wife attempted to obtain an interest in the property as part of her divorce action.

Like a constructive trust, a resulting trust may be imposed to prevent unjust enrichment. The commissions claimed by Intervenor are solely the result of her own labor, and it would clearly be unjust to enrich the Plaintiff at Intervenor's expense. Intervenor has no duty whatsoever to support either her broker's former wife or their children. Requiring her to do so or give up her profession would be so unjust as to entitle her to an equitable remedy to prevent it. Intervenor lives in a small central Utah town where the establishment of a broker-agent relationship is not easy. If she continues to work for this broker under the circumstances imposed by the District Court, she is entitled to no money whatsoever for her endeavors. If she leaves that employment, she may well not be able to pursue her profession. Obviously, this particular situation which makes it impossible for her to continue her profession is a question of

fact which the trier of fact ought to consider in imposing a remedy. Intervenor has been cut off from any ability to present such facts, and she should be allowed to do so.

The major case in Utah regarding the operation of resulting trusts is the Matter of Estate of Hock, 655 P.2d 1111 (Utah 1982) where the Court stated:

> The general rule for the creation of a purchase money resulting trust by operation of law has been set out in Restatement (Second) of Trusts Section 440 (1959):
>
> > Where a transfer of properties is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid, except as stated in Sections 441, 442 and 444.
>
> A similar formulation of this doctrine has been adopted in Utah, Hawkins vs. Perry, 123 Utah 16, 253 P.2d 372 (1953), and we have previously cited with approval Section 440 of the Restatement (Second) of Trusts. Little vs. Alder 19 Utah 2d 163, 428 P.2d 156 (1967). The fact which must be proven in the case of a purchase money resulting trust is that one party paid the purchase price for property and another party was given legal title. The recitals in the deed do not preclude evidence of the actual transaction. Jackson vs. Hernandez, Texas, 155 Tex. 249, 285 S.W.2d 184 (1956). Professor Scott in his treatise on trusts explains the interworking of these factors:
>
> > If there's no evidence as to the intention of the parties, other than the fact that A paid the purchase price for conveyance to B, a resulting trust arises in favor of A. It is unnecessary for A to introduce further evidence that the trust was intended, since the character of the transaction itself raises the inference that B was not to take the property beneficially. 5 Scott, Law of Trusts Section 440 (3d ed. 1967). 655 P.2d at 1115.

While Intervenor has paid no money for the transfer of

property (or money) to Acres West Real Estate, Intervenor obviously has provided a service, the result of which was the transfer of that money. Under the doctrine of resulting trust, "It is essential that there be an actual payment of money, property, or services, or an equivalent, constituting valuable consideration." 76 Am. Jur.2d Section 206 (emphasis added). Clearly, whether or not title to the money vested in Defendant, or whether it passes through to Intervenor, the result is the same. Any interest Defendant has in the money owed to Intervenor for real estate and rental commissions, as may be proved at trial, is held in trust specifically for Intervenor. The defendant broker has no right or ability to pass on any interest that he may have to any third party, and no ordinary creditor of his may assert an interest therein. If Intervenor can show the facts as she states them, she is entitled to the benefit of a resulting trust. She has been precluded from making that showing, and this case should be remanded with instructions to the trial Court to give her that opportunity.

CONCLUSION

Intervenor, by having her amended complaint in intervention dismissed prior to trial, has been denied an opportunity to show facts adequate to entitle her to the real estate commissions she claims. She should be given the opportunity to make her proof, and this Court should give guidance to the trial Court by ruling

that her causes of action are valid, subject to proof thereon.

MCCULLOUGH, JONES & IVINS

W. Andrew McCullough

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 1989, I did mail four true and correct copies of the above and foregoing Brief Appellant, postage prepaid, to Marcella L. Keck, Attorney for Plaintiff and Respondent, 9 Exchange Place, Suite 808, Salt Lake City, Utah 84111; and to Eldon A. Eliason, Attorney for Defendant and Respondent, P.O. Box 605, Delta, Utah 84624.

ADDENDUM

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF UTAH, IN AND FOR MILLARD COUNTY

****

CARRIE JO LAW,

Plaintiff, CASE NUMBER CV. 7860

-vs- RAY M. HARDING, JUDGE

ROBERT FRANK LAW,

Defendant. **MEMORANDUM DECISION**

****

The Court having considered Lynne Larson's motion to intervene will grant that motion.

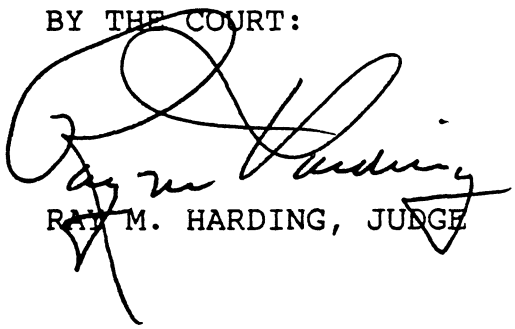
Rule 24 of the Utah Rules of Civil Procedure allows intervention as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action. . . ." Ms. Larson's claim to part of the money in the bank account certainly gives her the required interest in the property.

The Court is concerned that Ms. Larson seems to be represented in this intervention action by the plaintiff's attorney. Because of the potential for conflicts of interest, the Court would suggest that Ms. Larson obtain her own independent counsel.

Counsel for Plaintiff to prepare an order incorporating the terms of this decision and submit it to opposing counsel for approval as to form prior to filing with the Court for signature.

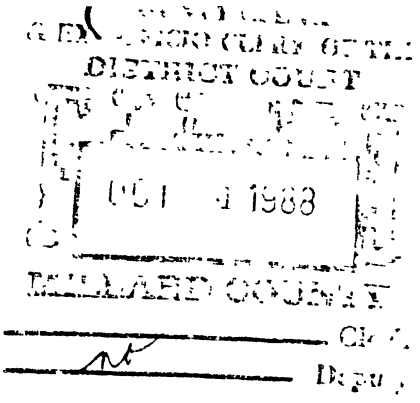
Dated this 2nd day of September, 1988.

BY THE COURT:



RAY M. HARDING, JUDGE

cc: Eldon A. Eliason Esq.
Marcella L. Keck Esq.



W. ANDREW MCCULLOUGH (A2170)
MCCULLOUGH, JONES & IVINS
Attorneys for Intervenor
930 South State Street, Suite 10
Orem, Utah 84058
Telephone: (801) 224-2119

IN THE FOURTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY

STATE OF UTAH

---oooOooo---

CARRIE JO LAW,	:	
Plaintiff,	:	
	:	COMPLAINT IN INTERVENTION
vs.	:	
ROBERT FRANK LAW,	:	
Defendant,	:	
M. LYNNE LARSON,	:	
	:	Civil No. 7860
Intervenor.	:	

---oooOooo---

COMES NOW the Intervenor in the above-entitled action who complains of Plaintiff and for cause of action alleges as follows:

1. Plaintiff and Defendant were previously husband and wife, and are now divorced.

2. Intervenor is a licensed real estate sales associate affiliated with Acres West Real Estate, a real estate agency owned by Defendant herein, as Real Estate Broker.

3. Over the last several months, Intervenor has listed and

sold three properties for which Security Title Company of Millard County has handled the title work and closings.

4. That she is due, from the funds held by Security Title, commissions as follows: from transaction no. 87EM026, the sum of $742.50, from transaction no. 88EM023, the sum of $486.00 and from transaction no. 88EM028, the sum of $1140.00.

5. On or about June 21, 1988 Plaintiff caused to be served upon Security Title of Millard County a writ of garnishment in an attempt to garnish funds due from Security Title of Millard County to Defendant herein.

6. Plaintiff has claimed, through various motions filed with this Court, and claims made with Security Title of Millard County, that she is due all sums to be paid by Security Title of Millard County to Acres West Real Estate Agency, including those amounts due to Intervenor as a result of listing and/or sales of real estate.

7. The commissions due to Intervenor as aforesaid are the sole property of Intervenor and are not subject to garnishment or execution by Plaintiff or any other person claiming to be a creditor of Defendant.

8. Intervenor is entitled to a declaratory judgment that the commissions earned by her are her own separate property and not subject to the claims of any other party hereto.

WHEREFORE, Intervenor prays judgment as follows:

1. For a declaratory judgment that funds due to her as earned commissions as a sales associate with Acres West Real Estate are her own personal property and not subject to garnishment or execution by either Plaintiff or Defendant herein.

2. For an order of this Court directing Plaintiff to cease and desist from her efforts to garnish or execute on commissions due to Intervenor.

3. For a declaratory judgment that Intervenor is owed the sum of $2368.50 as commissions from transactions 87EM026, 88EM023 and 88EM028 and that such sums are due and payable upon closing of those transactions.

4. For such other and further relief as the Court deems equitable and proper in the premises.

DATED this 20th day of October, 1988.

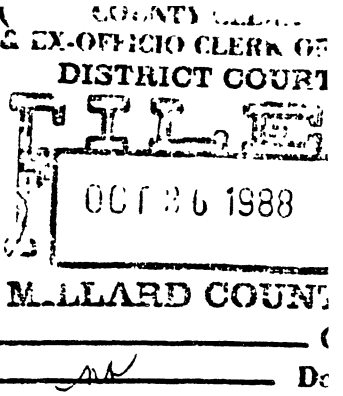
MCCULLOUGH, JONES, & IVINS

W. Andrew McCullough
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 1988, I did mail a true and correct copy of the above and foregoing Complaint in Intervention, postage prepaid, to Marcella L. Keck, Attorney for Plaintiff, 9 Exchange Place, Suite 808, Salt Lake City, Utah 84111 and to Eldon A. Eliason, Attorney for Defendant, P.O. Box 605, Delta, Utah 84620.

W. Allen McCullough



John D. Parken (2518)
Marcella L. Keck (4063)
Attorneys for Plaintiff
PARKEN & KECK
Suite 808 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 596-2920

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR MILLARD COUNTY, STATE OF UTAH

---oooOooo---

CARRIE JO LAW,	:	MOTION TO DISMISS OR IN THE ALTERNATIVE
Plaintiff,	:	FOR SUMMARY JUDGMENT
v.	:	Civil No. 7860
ROBERT FRANK LAW,	:	
Defendant,	:	
M. LYNNE LARSON,	:	
Intervenor.	:	

---oooOooo---

Plaintiff, by and through her counsel, Marcella L. Keck, and pursuant to Rule 12(b)(6) and pursuant to Rule 56 of the Utah Rules of Civil Procedure hereby moves this Court for an Order dismissing Intervenor Complaint in Intervention or, in the alternative, for Summary Judgment against Intervenor. This Motion is based upon Intervenor's failure to state a claim upon which relief can be granted or, in the alternative, this Motion is based upon there being no genuine issue as to any material fact and Plaintiff's entitlement to judgment as a matter of law.

This Motion is supported by the pleadings on file in this matter,

together with Plaintiff's Memorandum in support of this Motion.

DATED this 24th day of October, 1988.

PARKEN & KECK

By _____
Marcella L. Keck
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that on the 24th day of October, 1988, I caused a true and correct copy of the foregoing Motion to Dismiss or, in the alternative, for Summary Judgment to be mailed, postage prepaid, to the following:

Eldon A. Eliason
Attorney for Defendant
P. O. Box 605
Delta, UT 84620

W. Andrew McCullough
McCullough, Jones & Ivins
Attorneys for Intervenor
930 South State Street, Suite 10
Orem, UT 84058

_____

together with Plaintiff's Memorandum in support of this Motion.

DATED this 24th day of October, 1988.

PARKEN & KECK

By _____
Marcella L. Keck
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that on the 24th day of October, 1988, I caused a true and correct copy of the foregoing Motion to Dismiss or, in the alternative, for Summary Judgment to be mailed, postage prepaid, to the following:

Eldon A. Eliason
Attorney for Defendant
P. O. Box 605
Delta, UT 84620

W. Andrew McCullough
McCullough, Jones & Ivins
Attorneys for Intervenor
930 South State Street, Suite 10
Orem, UT 84058

_____

filed November 9, 1988
mb

W. ANDREW MCCULLOUGH (A2170)
MCCULLOUGH, JONES & IVINS
Attorneys for Intervenor
930 South State Street, Suite 10
Orem, Utah 84058
Telephone: (801) 224-2119

IN THE FOURTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY

STATE OF UTAH

---oooOooo---

CARRIE JO LAW,	:	
	:	
Plaintiff,	:	MOTION FOR LEAVE TO AMEND COMPLAINT IN INTERVENTION
vs.	:	
	:	
ROBERT FRANK LAW,	:	
	:	
Defendant,	:	
	:	
M. LYNNE LARSON,	:	
	:	Civil No. 7860
Intervenor.	:	

---oooOooo---

COMES NOW the Intervenor herein and, pursuant to Rule 15 U.R.C.P., moves the Court for an order granting leave for Intervenor to amend her Complaint in Intervention. This motion is made on the grounds that the original Complaint in Intervention was filed with incomplete and/or inaccurate information, based upon information that was misunderstood by counsel for Intervenor. This amendment is necessary to completely allege Intervenor's claims.

This motion is based upon the Memorandum of Points and Authorities submitted herewith.

DATED this 8th day of November, 1988.

MCCULLOUGH, JONES, & IVINS

W. Andrew McCullough
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 1988, I did mail a true and correct copy of the above and foregoing Motion for Leave to Amend Complaint in Intervention, postage prepaid, to Marcella Keck, Attorney for Plaintiff, 9 Exchange Place, Suite 808, Salt Lake City, Utah 84111, and to Eldon A. Eliason, Attorney for Defendant, P.O. Box 605, Delta, Utah 84624.

W. ANDREW MCCULLOUGH (A2170)
MCCULLOUGH, JONES & IVINS
Attorneys for Intervenor
930 South State Street, Suite 10
Orem, Utah 84058
Telephone: (801) 224-2119

IN THE FOURTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY

STATE OF UTAH

---oooOooo---

CARRIE JO LAW,	:	
	:	
Plaintiff,	:	AMENDED COMPLAINT IN INTERVENTION
vs.	:	
	:	
ROBERT FRANK LAW,	:	
	:	
Defendant,	:	
	:	
M. LYNNE LARSON,	:	
	:	Civil No. 7860
Intervenor.	:	

---oooOooo---

COMES NOW the Intervenor in the above-entitled action who complains of Plaintiff and for causes of action alleges as follows:

FIRST CAUSE OF ACTION

1. Plaintiff and Defendant were previously husband and wife, and are now divorced.

2. Intervenor is a licensed real estate sales associate affiliated with Acres West Real Estate, a real estate agency owned

by Defendant herein, as Real Estate Broker.

3. Over the last several months, Intervenor has listed and sold three properties for which Security Title Company of Millard County and/or Utah Title Company has handled the title work and closings.

4. That she is due, from the funds held by Security Title and/or Utah Title, commissions as follows: from transaction no. 87EM026, the sum of $742.50, from transaction no. 88EM023, the sum of $486.00 and from transaction no. 88EM028, the sum of $1140.00.

5. On or about June 21, 1988 Plaintiff caused to be served upon Security Title of Millard County and Utah Title writs of garnishment in an attempt to garnish funds due from Security Title of Millard County and Utah Title to Defendant herein.

6. Plaintiff has claimed, through various motions filed with this Court, and claims made with Security Title of Millard County and Utah Title, that she is due all sums to be paid by Security Title of Millard County and/or Utah Title to Acres West Real Estate Agency, including those amounts due to Intervenor as a result of listing and/or sales of real estate.

7. The commissions due to Intervenor as aforesaid are the sole property of Intervenor and are not subject to garnishment or execution by Plaintiff or any other person claiming to be a creditor of Defendant.

, Jones,

8. Intervenor is entitled to a declaratory judgment that the commissions earned by her are her own separate property and not subject to the claims of any other party hereto.

SECOND CAUSE OF ACTION

1. Intervenor re-alleges paragraphs 1-8 of her first cause of action as though they were fully set forth herein.

2. Acres West Realty, in addition to its business of selling homes, acts as a rental agent for certain rental properties in the Millard County area, which properties are owned by absentee landlords.

3. Intervenor is due, as the leasing agent on certain of those properties, the sum of $608.41, which amount was due and payable from Defendant's general account in his bank.

4. Plaintiff has caused a writ of garnishment to be issued against Defendant's bank, holding his general account, including the amounts owed to intervenor.

5. Intervenor is entitled to a declaratory judgment that the commissions earned by her are her own separate property and not subject to the claims of any other party hereto.

THIRD CAUSE OF ACTION

1. Intervenor re-alleges paragraphs 1-8 of her first cause of action and 1-5 of her second cause of action as though fully set

forth herein.

2. Defendant herein, by operation of law, is a de facto trustee, and Intervenor is a de facto beneficiary, of a resulting trust whereby Defendant has come in to certain property conveyed to him as the result of the efforts of Intervenor.

3. Because of the resulting trust, the amounts claimed by Intervenor herein as set forth above, are sole and separate property of Intervenor and are not subject to the garnishment or other execution actions of Plaintiff herein

WHEREFORE, Intervenor prays judgment as follows:

1. For a declaratory judgment that funds due to her as earned commissions as a sales associate with Acres West Real Estate are her own personal property and not subject to garnishment or execution by either Plaintiff or Defendant herein.

2. For an order of this Court directing Plaintiff to cease and desist from her efforts to garnish or execute on commissions due to Intervenor.

3. For a declaratory judgment that Intervenor is owed the sum of $2368.50 as commissions from transactions 87EM026, 88EM023 and 88EM028 and that such sums are due and payable upon closing of those transactions.

4. For declaratory judgment that Intervenor is owed the sum of $608.41 as rental commissions as rental agent for absentee

landlords.

5. For a declaration of a resulting trust upon any monies due Intervenor as a result of her own labor and an exemption of any funds held by Defendant in such a trust from any actions by Plaintiff to execute on Defendant's property.

6. For such other and further relief as the Court deems equitable and proper in the premises.

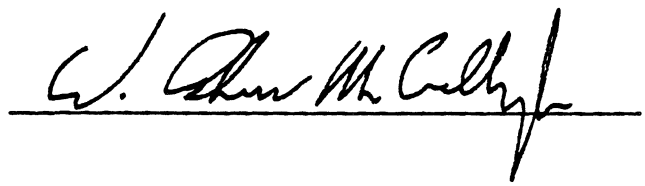
DATED this 28th day of October, 1988.

MCCULLOUGH, JONES, & IVINS

W. Andrew McCullough
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 1988, I did mail a true and correct copy of the above and foregoing Complaint in Intervention, postage prepaid, to Marcella L. Keck, Attorney for Plaintiff, 9 Exchange Place, Suite 808, Salt Lake City, Utah 84111 and to Eldon A. Eliason, Attorney for Defendant, P.O. Box 605, Delta, Utah 84620.



IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF UTAH, IN AND FOR MILLARD COUNTY

****

CARRIE JO LAW,

Plaintiff, CASE NUMBER 7860

-vs- RAY M. HARDING, JUDGE

ROBERT FRANK LAW,

Defendant. **MEMORANDUM DECISION**

****

The Court, having considered intervenor Lynn Larson's motion to amend judgment, and her motion to stay execution, will deny those motions. Judge Walquist who heard this matter on November 9th, 1988, is a Senior District Court Judge, and it is not within the jurisdiction of this Court to set aside his ruling.

The Court notes that this divorce action has been within the legal system since 1985, which is an unusually long time for such a case. In the interest of fairness to the parties, and of judicial economy, the Court would urge counsel in this matter to do all within their power to bring this case to a close as quickly as possible.

Dated this 15th day of November, 1988.

BY THE COURT:

RAY M. HARDING, JUDGE

cc: Eldon A. Eliason, Esq.
Marcella L. Keck, Esq.
W. Andrew McCullough, Esq.

John D. Parken (2518)
Marcella L. Keck (4063)
Attorneys for Plaintiff
PARKEN & KECK
Suite 808 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 596-2920

IN THE DISTRICT COURT OF FOURTH JUDICIAL DISTRICT

IN AND FOR MILLARD COUNTY, STATE OF UTAH

---ooo0ooo---

CARRIE JO LAW,	:	ORDER
Plaintiff,	:	
v.	:	Civil No. 7860
ROBERT FRANK LAW, Defendant,	:	
M. LYNNE LARSON,	:	
Intervenor.	:	

---oooOooo---

The following matters came on for hearing before the above-entitled Court, The Honorable John F. Wahlquist presiding, on November 9, 1988, at approximately 10:00 a.m.: Plaintiff's Motion for Order in Aid of Execution, Defendant's Motion for Stay of Execution, Intervenor's Motion to File Amended Complaint, and Plaintiff's Motion to Dismiss. Plaintiff was present and was represented by counsel Marcella L. Keck; Defendant was present and was represented by counsel Eldon A. Eliason; Intervenor was present and was represented by W. Andrew McCullough. Argument was

made by all counsel with regard to the various motions pending. Among other things, Plaintiff argued that whatever the Court's ruling, all funds attached through Writ of Garnishment of which there was no dispute by Lynne Larson, should be released to the Plaintiff. Both Defendant and Intervenor agreed. It was represented to the Court that Intervenor's interest was approximately 60% of all funds held and Defendant's interest was 40%. Upon the Court's inquiry, it was represented by counsel for Defendant that Defendant was not insolvent, had not filed a bankruptcy petition, and no bankruptcy petition was imminent. The Court, having heard argument of counsel, including Intervenor's arguments with regard to the basis of her claims, *inter alia*, her claim that the funds attached by Plaintiff belonged to her by virtue of a "resulting trust," determined that the basis of Intervenor's claims were essentially those of a creditor and that in the context of the garnishment proceedings, she had failed to state a claim in which relief could be granted. Based upon the arguments of counsel and good cause appearing therefor, it is hereby

ORDERED that Intervenor's Motion to File an Amended Complaint be and hereby is granted and that Plaintiff's Motion to Dismiss the Amended Complaint in Intervention be and is hereby granted; and it is

FURTHER ORDERED that all funds subject to garnishment as of the date of the hearing be released to the Plaintiff, and it is

FURTHER ORDERED that Plaintiff's Motion for an Order in Aid of Execution be and is hereby granted consistent with the terms requested in Plaintiff's Motion.

DATED this 5 day of November, 1988.

BY THE COURT:

John F. Wahlquist
District Judge

Approved as to Form:

Eldon A. Eliason
Attorney for Defendant

W. Andrew McCullough
Attorney for Intervenor

MAILING CERTIFICATE

I hereby certify that on the 17th day of November, 1988, I caused a true and correct copy of the foregoing Order to be mailed, postage prepaid, to the following:

Eldon A. Eliason
P. O. Box 605
Delta, UT 84624

W. Andrew McCullough
McCullough, Jones & Jensen
930 South State Street, Suite 10
Orem, UT 84057

Dawna L. Fazzio